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No. 95-953

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

LIBERTY CABLE COMPANY, INC.,

Petitioner,

- against -

CITY OF NEW YORK, RALPH A. BALZANO,

(caption continued on following page)

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# BRIEF IN OPPOSITION

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February 16, 1996

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Respondents.

## COUNTER-QUESTION PRESENTED

Whether this Court should grant the writ where: (a) the entire case will be moot if, because of a bill signed by the President on February 8, 1996, the administrative proceeding pending against petitioner is withdrawn or if that proceeding is resolved in petitioner's favor and (b) even if the proceeding is not immediately withdrawn, the new legislation has completely altered the ripeness analysis in this case so that this Court, in ruling on ripeness on the present record, would be rendering an opinion on a state of facts that no longer exists and no longer matters to anyone.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# BRIEF IN OPPOSITION

## STATEMENT OF THE CASE

### A. *Liberty's Methods Of Signal Delivery*

Petitioner Liberty Cable Company, Inc. ("Liberty") receives video signals from a satellite or satellites, processes the signals and then delivers them to its customers (JA1180).[1] Its customers are building owners, such as cooperative housing corporations and, less frequently, landlords and condominium associations (JA298, 312, 317). Cooperative housing corporations and condominium associations typically bill their residents to cover Liberty's charges for basic channels (JA317, 339). The residents of the buildings to which Liberty provides video signals are termed Liberty's "subscribers" and have the option of purchasing additional channels directly from Liberty (JA298, 312, 317). Residents of buildings that are customers of Liberty may purchase cable services from the franchised cable operator in the area instead of, or in addition to, receiving video signals from Liberty (JA317).

The signal Liberty receives from a satellite or satellites is transmitted through the air by microwave to a receiving dish and then travels by cable to Liberty's subscribers (JA1180-81). Liberty's type of microwave transmission, which takes place over the 18 Ghz band, requires a line of sight between the transmitter and receiver (JA1424). The signal travels by cable through three different configurations (JA1180-81). In none of the three configurations does any of Liberty's equipment or cable come in contact with property of the City of New York ("City") (JA1180-81).

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[1] Numbers in parentheses preceded by "JA" refer to pages in the Joint Appendix filed in the Court of Appeals.

In the first configuration, the receiver is on the top of the subscribers' building and the cable runs from the receiver to the subscribers without touching any other building (JA1180). This configuration is termed a "SMATV" system, for "Satellite Master Antenna Television" system, although the word "Satellite" is a misnomer because the signal comes by microwave from Liberty's transmitter rather than directly from a satellite (JA1178-79).

In the second configuration, the cable also runs to subscribers in one or more other buildings that are commonly owned, controlled or managed with the building on which the receiver sits (JA1181). This is referred to as a "common system" (JA1181).

The third configuration is the only configuration at issue in this lawsuit. In this configuration, the cable runs to subscribers in one or more other buildings that are not commonly owned, controlled or managed with the building on which the receiver sits (JA1181). This is referred to as a "non-common system" (JA1181). Buildings that are not commonly owned, controlled or managed will be referred to herein as "non-common buildings."

### *B. Relevant Statutes And Regulations*

The relevant federal statute is the Cable Communications Policy Act of 1984 ("Cable Act"). Pub L No 98-549, 98 Stat 2780 (codified at 47 USC sections 521-59). The Cable Act was amended in 1992. Pub L No 102-385, 106 Stat 1460. The Cable Act explicitly preempts inconsistent provisions of state law. 47 USC section 556(a).

The Cable Act defines a "cable operator" as any person who provides "cable service" over a "cable system." 47 USC section 522(5). It is undisputed that Liberty provides "cable service" and that Liberty provides its cable services over a "cable system." *See id.* sections 522(6) and 522(7). It is further undisputed that, but for its non-common systems, Liberty would come within the following exemption from the definition of "cable system":

> a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way ....

*Id.* section 522(7)(B). This exemption sometimes is referred to as the "private cable exemption" and the requirement that, to fall within the exemption, the cable must not connect buildings that are not commonly owned, controlled or managed sometimes is referred to as the "common ownership requirement."

Under the Cable Act, a cable operator may not provide cable service without a franchise from a franchising authority. 47 USC sections 522(9) & (10), 541(b)(1). In the State of New York the municipality is the franchising authority. NY Executive Law section 819.

The Cable Act contains requirements that all cable operators must meet. These include the requirements that cable operators: provide channel capacity for commercial leased access by program suppliers unaffiliated with the cable operator, 47 USC section 532; not avoid low-income areas, *id.* section 541(a)(3); must carry the local broadcast channels, *id.* sections 534, 535; provide subscribers with the ability to block

out obscene or indecent programming upon subscriber request, *id.* section 544(d); comply with FCC regulations concerning the emergency broadcast system, *id.* section 544(g); and meet strict requirements on the collection and disclosure of personally identifiable information concerning subscribers, *id.* section 551. The Cable Act also specifies certain requirements that the franchising authority may, in its discretion, impose on cable operators. These include the requirements that cable operators: provide channel capacity for public, educational or government use, *id.* section 531; pay fees to the franchising authority, *id.* section 542; meet the franchising authority's requirements for technical standards and provision of services, facilities and equipment, *id.* section 544; and meet the franchising authority's consumer protection and customer service requirements, *id.* section 552.

In the State of New York cable television is regulated by Article 28 of the Executive Law and, at all times relevant hereto, by the New York State Commission on Cable Television ("NYSCCT") (*see* Petition at 3 n.3). NY Executive Law sections 811 through 831; 9 NYCRR Parts 589 through 599. It is undisputed that Liberty meets the definition of "cable television system" in the Executive Law. NY Executive Law section 812(2) (App. 177). As here relevant, the Executive Law provides that no cable television system may operate, whether or not it uses a public thoroughfare, without a franchise from each municipality in which it provides service. *Id.* section 819[1]. The Executive Law also provides that no franchise shall be effective until it has been confirmed by the NYSCCT. *Id.* section 821[1]. The Executive Law further provides that a municipality shall have the power to require a franchise of every cable television system providing service within the municipality, whether or not the system uses a public street, and that the "provision of any municipal charter

or other law authorizing a municipality to require and grant franchises is hereby enlarged and expanded, to the extent necessary, to authorize such franchises." *Id.* section 821[2]. Finally, the Executive Law provides that NYSCCT may issue such orders as it may find necessary and may fine any cable television company that violates any provision of Article 28 up to $1,000 per day. *Id.* sections 816[1], 827-a.

The New York City Charter defines a "franchise" as a grant by a City agency of a "right to occupy or use the inalienable property of the city to provide a public service." NYC Charter section 362[b]. The Charter provides that franchises may be awarded only pursuant to an authorizing resolution of the City Council, *id.* section 363[a] (App. 184), and that franchises awarded by City agencies must be approved by the Franchise and Concession Review Committee and the Mayor, *id.* sections 363[f] (App. 185), 372, 373.

On October 13, 1993, the City Council adopted Resolution 1639, which empowers the Department of Telecommunications and Energy, which is now the Department of Information Technology and Telecommunications ("DOITT"), to issue franchises for cable television services "and the installation of cable television facilities and associated equipment on, over, and under the inalienable property of the City of New York" (App. 139-46). Resolution 1639 imposes several of the requirements that, under the Cable Act, franchising authorities may impose on cable operators, including franchise fees, quality work and construction methods, "state-of-the-art" cable service, universal service, the prompt and efficient resolution of consumer complaints, and channel capacity for public, educational and governmental use (App. 141-44). Resolution 1639 also provides that no franchise shall be awarded unless the area covered by the franchise includes at least one entire

community district and 30,000 households (App. 144-45). *See* NYC Charter sections 2700 through 2702.

### C. *Events Prior To This Lawsuit*

On March 6, 1992, in *Beach Communications, Inc. v. Federal Communications Commission*, 959 F2d 975 (DC Cir, 1992) ("*Beach I*"), the United States Court of Appeals for the District of Columbia Circuit expressed grave concern that the equal protection clause is violated by the exclusion of non-common systems, such as those Liberty now operates, from the private cable exemption, *i.e.*, by the inclusion of non-common systems in the coverage of the Cable Act while SMATV and common systems are not included. The Court remanded the matter to the Federal Communications Commission ("FCC"). On April 7, 1992, Liberty sent a letter to the FCC urging the FCC to defend the exclusion of non-common systems from the private cable exemption (JA542-43, 608-20). Among other things, Liberty stated that the first amendment claims of the petitioners in *Beach* were not ripe (JA609), that it is the "better economic choice" for Liberty to connect non-common buildings by microwave, rather than cable, because that avoids state and local franchising requirements (JA615), and that if non-common systems are subject to the Cable Act Liberty will expand its systems to non-common buildings by microwave rather than cable (JA615).

On June 9, 1992, the District of Columbia Court of Appeals struck down the exclusion of non-common systems from the private cable exemption on equal protection grounds under the rational basis test. *Beach Communications, Inc. v. Federal Communications Commission*, 965 F2d 1103 (DC Cir, 1992) ("*Beach II*"). According to Liberty, it began constructing its non-common systems, in which non-common

buildings are connected by cable, in January of 1993 (JA1182). However, on June 1, 1993, this Court reversed *Beach II* and upheld the exclusion of non-common systems from the private cable exemption on equal protection grounds under the rational basis test. *Federal Communications Commission v. Beach Communications, Inc.*, ___ US ___, 113 S Ct 2096 (1993) ("*Beach III*"). This Court remanded the case to the Court of Appeals for a determination of whether heightened scrutiny should apply, because first amendment rights are involved, and the Court of Appeals ruled on October 22, 1993 that heightened scrutiny did not in fact apply. *Beach Communications, Inc. v. Federal Communications Commission*, 10 F3d 811 (DC Cir, 1993) ("*Beach IV*").

After *Beach IV* thus upheld the Cable Act's coverage of inclusion of non-common systems, Liberty, contrary to its representations to the FCC in its April 7, 1992 letter, continued to install new non-common systems with cable and did not, in its existing non-common systems, remove its wires between non-common buildings and replace the connections with microwave transmission (JA1182). Liberty also did not apply to DOITT for a franchise at that time.

Respondent Time Warner Cable of New York City and its affiliate Respondent Paragon Cable Manhattan will be referred to as "Time Warner." The two cable franchises they hold cover all of Manhattan (JA267). In May of 1994 Time Warner discovered the existence of some of Liberty's non-common systems (JA398-403) and filed a complaint with the NYSCCT arguing that operation of its non-common systems renders Liberty a "cable operator" under the Cable Act and that Liberty was not complying with the requirements of the Cable Act and Executive Law (JA393-409). On August 23, 1994, NYSCCT, acting on Time Warner's complaint, issued an order

to show cause commencing a proceeding against Liberty and directing Liberty to show cause why it should not be determined to be a cable television system under Article 28 or, alternatively, why it should not be compelled to remove all cables between non-common buildings until it obtains a franchise from the City and its franchise is confirmed by NYSCCT (App. 135-38). The order to show cause recites that NYSCCT staff inspected two premises at which they found evidence that Liberty was operating non-common systems and that Liberty thus appears to be a cable system under the Cable Act and not within the private cable exemption (App. 136-37). The order to show cause gave Liberty until September 18, 1994 to enter a notice of appearance (App. 137).

On September 9, 1994, Liberty met with DOITT in order to request that DOITT ask NYSCCT to extend Liberty's time to respond to the order to show cause (JA831). At that meeting, *inter alia*, Liberty stated that if NYSCCT were to rule against Liberty, Liberty would replace its cable connections between non-common buildings with microwave connections (JA831). On October 18, 1994, Liberty requested of NYSCCT an extension of its time to respond to the order to show cause to April 17, 1995 (JA485). Liberty requested this extension in order to conclude "negotiations" between it and DOITT that would result in Liberty obtaining a franchise or some "other mutually acceptable resolution of this matter" (JA485). Liberty also stated, "In the interim, Liberty agrees that it will not construct any new 'cable television systems' as that term is defined in 47 USC § 522(7)," meaning non-common-systems (JA485). By letter dated October 19, 1994, NYSCCT denied Liberty's request and directed Liberty to respond to the order to show cause by November 1, 1994 (JA487-88).

By letter dated October 28, 1994, Liberty, for the first time, expressed an interest in a franchise from DOITT (JA493). Its letter reads in its entirety, "Please be advised that [Liberty] is interested in applying for a cable television franchise pursuant to the Resolution No. 1639 and applicable federal law" (JA493).

Liberty responded to NYSCCT's order to show cause on October 31, 1994 (JA503-09). In its response Liberty again requested that the hearing be held in abeyance for 180 days in order for Liberty to conduct negotiations for a franchise and promised, if that request were to be granted, not to construct any "'cable systems' as that term is defined in 47 USC § 522(7)" during that period (JA503-04). On November 18, 1994, NYSCCT scheduled a hearing for December 9, 1994 (App. 148).

### *D. Events Since Commencement Of This Lawsuit*

The summons and complaint herein were issued December 8, 1994; the Appendix to the Petition includes the Second Amended Complaint which is identical as relevant hereto (App. 97-121, JA5). In the complaint Liberty admitted that because of its non-common systems, it is required to have a franchise from DOITT but never applied for one (App. 105, 106). Liberty contended that application of the franchise requirement to it violates its rights under the first amendment because Liberty does not use public rights-of-way (App. 112-13).

At the hearing before the NYSCCT on December 9, 1994, procedural matters were discussed and argument was heard but no evidence was taken (JA550-76). One of the members of NYSCCT and an attorney for Time Warner stated that among the issues before the NYSCCT is whether the Cable Act's

coverage of non-common systems is constitutional (JA565, 566).

At the conclusion of the hearing NYSCCT issued the "standstill order" that is the subject of Liberty's present motion for a preliminary injunction (App. 150). The order directs that Liberty (App. 150):

> establish no additional cable or other closed transmission interconnections of buildings not commonly owned, controlled or managed [and] that Liberty shall not energize any new subscribers through such hard-wired interconnected buildings to which service is not currently being provided unless under common management, control or ownership ....

Liberty was not enjoined from continuing to use, and derive revenue from, its existing, admittedly-illegal non-common systems.

Liberty moved in the District Court for a temporary restraining order and preliminary injunction prohibiting enforcement of the standstill order (JA131-33). In its initial moving papers, Liberty stated that the cost of a "head end" facility, which receives signals from satellites and transmits signals to the receivers on top of buildings owned by Liberty's customers, is $750,000 and that the cost of a receiver is $25,000 (JA137).

Time Warner submitted an affidavit of its Senior Vice President for Engineering and Technical Operations ("Chief Engineer") (JA744-50), in which he stated as follows. After NYSCCT issued its order to show cause, Liberty filed applications with the FCC for receiver sites at the very

buildings identified by Time Warner as being served illegally by Liberty in non-common configurations (JA745, 752-823). In addition, since 1991 Liberty has filed applications for receiver sites at all but three of the buildings Liberty admits to serving in non-common configurations (JA746). As to the other three sites, there is no technical reason why Liberty cannot serve these buildings by microwave transmission (JA747). Although Liberty contends that there are 33 buildings that it wishes to add as customers in non-common configurations, it has identified only two such buildings and both can be served by existing transmitters (JA748-49).

Time Warner's Chief Engineer also stated as follows. Although Liberty states that its "head end" facility is on East 95th Street, in fact Liberty has at least seven transmitter sites, with applications pending for more (JA747). At many of these sites Liberty maintains multiple transmission paths (JA747). The signal from a single transmitter can be split multiple times and it is apparent from Liberty's FCC applications that Liberty already splits its signal at numerous transmitter locations (JA748). Liberty also uses, and is capable of increasing its use of, repeaters, which are less expensive than transmitters (JA748). Liberty always is free to negotiate with property owners to obtain transmitter and repeater sites in order to give it "line-of-sight" access to its receivers (JA747-48).

Finally, Time Warner's Chief Engineer stated as follows. Based on information obtained from suppliers of equipment used by systems like Liberty's, it appears that the capital investment per building for a SMATV configuration is about $16,000 (JA749). Because Liberty typically enters into contracts of five or ten years' duration in which the building owner promises to pay every month for basic service to every unit, and because Liberty then also receives revenue from

subscribers for premium and pay-per-view services, Liberty should be able to install SMATV configurations profitably at even relatively small apartment buildings (JA749-50).

In response to the affidavit of Time Warner's Chief Engineer, Liberty submitted an affidavit of its Director of Engineering (JA1424-26). Although Liberty's Director of Engineering asserted that Time Warner's Chief Engineer's description of Liberty's microwave system was "inaccurate, incomplete and demonstrates [*sic*] an ignorance of how 18 ghz microwave technology is designed and deployed," Liberty's Director of Engineering offered only the "example" that Time Warner's Chief Engineer was "completely wrong about the cost and profitability of 18 ghz transmission equipment, the ability to 'split' the signal and that 'Liberty can technically serve practically any apartment building' with 18 ghz microwave technology" (JA1424). But Liberty's Director of Engineering then offered absolutely no figures on cost or profitability; furthermore, the majority of the remainder of his affidavit merely repeated over and over the proposition, obviously recognized by Time Warner's Chief Engineer, that Liberty must negotiate with property owners and that there is no guarantee that it will be able to obtain a transmitter site for every building it wishes to serve (JA1424-26). Although Liberty's Director of Engineering did state that the selection of transmitter sites must take into account "preexisting microwave interference [and] signal degradation over distance," he offered no further explanation of these considerations and did not contend that these considerations made it impossible profitably to serve any of Liberty's existing non-common configurations or the 33 buildings allegedly interested in Liberty's service (JA1424).

On February 24, 1995, DOITT published its notice of rulemaking for solicitation for franchises for cable television service that does not use City property (App. 91-96). The notice states in part that DOITT had been unaware of any interest in franchises of this nature until Liberty's October 28, 1994 expression of interest in a franchise (App. 91). The notice provided that the public comment period on the proposed rules would close on April 3, 1995 and that there would be a public hearing on the proposed rules on April 4, 1995 (App. 91-92). (Comments were in fact received and the public hearing was in fact held as planned.)

## OPINIONS BELOW

### A. *The District Court Opinion*

Addressing ripeness, the District Court applied the two-part test of *Abbott Laboratories v. Gardner*, 387 US 136, 149 (1967). As to Liberty's first amendment claims, and as to the first part of the test, fitness for judicial decision, the District Court agreed with the analysis of *Beach I*, in which the Court of Appeals held not ripe claims of operators of non-common configurations that inclusion of non-common configurations in the definition of "cable system" violated the first amendment (App. 44-47). The District Court also agreed with the Court of Appeals in *Beach I* that because Liberty has not yet been offered a franchise by DOITT, Liberty cannot identify what burdens the franchise will place on Liberty, the Court cannot know the governmental interests that might justify the burdens, and, because the level of scrutiny to be applied depends on the burdens on Liberty's speech, the Court cannot even determine the level of scrutiny to be applied (App. 44-47).

As to the second part of the *Abbott Laboratories* test, the hardship to the parties of withholding decision, the District Court first found that the cost of Liberty's compliance with the franchising scheme in the interim, *i.e.*, until its claim is fit for judicial decision, is unknown, because the franchising process is ongoing, but that the "delay" may well be brief (App. 48). Second, the Court found, the threat that Liberty will have to remove the wires connecting non-commonly owned buildings is not imminent (App. 48 & n.18). The Court further found that any alleged hardship to Liberty from interruption of service to its subscribers in non-common configurations, or its inability to add subscribers in non-common configurations, is of Liberty's own making because of its failure to request a franchise from DOITT upon the issuance of *Beach III* in June of 1993 (App. 49-53). And finally, the District Court found that Liberty's claim that it will suffer hardship during the pendency of the franchising process is undercut by its requests for first a 30-day, and then a 180-day, adjournment of the NYSCCT hearing during which Liberty promised not to construct any new non-common systems (App. 53).

On the other hand, the District Court found that a substantial hardship would be imposed on NYSCCT and DOITT because those agencies' ongoing proceedings would be interfered with (App. 53-54). The Court noted that this Court held in *Abbott Laboratories* that the ripeness doctrine not only protects courts from premature adjudications, but also "'protect[s] the Agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties'" (App. 53) (quoting 387 US at 148-49). On balance, considering the two parts of the *Abbott Laboratories* test, the District Court determined that Liberty's first amendment claims were not ripe (App. 54).

The District Court also found Liberty's due process claims not ripe (App. 59-62). The Court noted that the gravamen of Liberty's due process claim had been that DOITT had no procedure by which Liberty could apply for a franchise for a cable television system that did not use City property and that upon issuance of the notice of rulemaking, Liberty's due process claim changed into the arguments that the City has boundless discretion in determining whether to award a franchise and that the process will take too long (App. 59-61). Accordingly, the District Court found Liberty's present due process arguments not ripe because: there has been no final agency action; a judicial attempt to rule on Liberty's claims at this time would require a ruling "in a vacuum on issues that might never arise"; and "a more fully developed factual record is required for reasoned adjudication of [Liberty's] claims" (App. 61). The Court also noted that the Cable Act requires DOITT to act reasonably and thus if the City acts unreasonably, either by unreasonably prolonging the proceedings or by imposing unreasonable burdens, Liberty may seek its remedy under the Cable Act on a fully-developed record (App. 61-62).

### *B. The Court of Appeals Opinion*

The Court of Appeals for the Second Circuit affirmed on the District Court's opinion (App. 5, 6). The Court of Appeals wrote further, however, to address Liberty's due process argument (App. 5-7). The Court stated (App. 6):

> Liberty is apparently the first cable operator ever to have approached the City about acquiring a franchise for a non-common system. Such systems are not in widespread use, and we were informed at oral argument that no city currently has franchising

> regulations in place for such systems. In a technical field like cable television, a governmental entity, authorized to license a variety of cable systems, is not required to anticipate all of the different types of service that cable operators might wish to render and keep licensing regulations on the shelf for every variety of applicant that might request a franchise.

The Court stated further that there was no evidence of unreasonable administrative delay and that as long as the City does not unduly delay the completion of the rulemaking proceeding and acts with reasonable diligence on Liberty's franchise application, Liberty's due process rights will not be violated (App. 6).

Although not in the record, it is undisputed that on November 13, 1995 the City concluded the rulemaking process by issuing a request for proposals for cable systems that would not use City property, that Liberty and one other entity submitted proposals and that the City has until March 1, 1996 to respond to those proposals (*see* Petition at 5 n.6).

## REASONS FOR DENYING THE WRIT

### A. *The Telecommunications Act of 1996 Has Entirely Changed the Ripeness Analysis In This Case, Rendering Review By This Court Pointless*

All of Liberty's claims are based on its rather extreme position that because it does not use any City property the first amendment prohibits any level of government from regulating it at all. However, on February 1, 1996, Congress passed the Telecommunications Act of 1996 ("Act") and it was signed

into law by the President on February 8, 1996. Section 301(a)(2) of the Act provides:

> CHANGE IN DEFINITION OF CABLE SYSTEM. Section 602(7) (47 U.S.C. 522(7)) is amended by striking "(B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way;" and inserting "(B) a facility that serves subscribers without using any public right of way;"

Section 522(7) contains exemptions from the definition of "cable system" and the new language inserted by section 301(a)(2) of the Act thus takes Liberty's non-common systems out of the coverage of the Cable Act entirely. Assuming that Liberty's non-common systems do not use public rights of way, and will continue not to do so, Liberty no longer needs a franchise from the City.

Thus, for the period beginning February 8, 1996, this case is moot. As to the period before that date, the Act entirely changes the ripeness analysis in at least the following respects. As to the first prong of the *Abbott Laboratories* test, fitness for judicial decision, there is no longer the question of what burdens either the Executive Law or the City will place on Liberty. The question is what will happen in the administrative proceeding. One possibility is that, now that Congress and the President have declared that non-common systems should not be covered by the Cable Act, the proceeding might be withdrawn. At the other extreme, the proceeding might continue and could result in the imposition of penalties against Liberty, as Liberty admittedly was in violation of the Cable Act for years before February 8, 1996.

More importantly, as to the second prong of the *Abbott Laboratories* test, hardship to the parties, the alleged hardship to Liberty has entirely disappeared, as Liberty now is free to operate its existing non-common systems without fear of sanctions from the NYSCCT and to construct new non-common systems. There is thus absolutely no countervailing consideration to the substantial hardship that would be imposed on NYSCCT by judicial interference with its ongoing proceeding concerning Liberty's operation without a franchise before the effective date of the Act (*see supra* page 15).

Because the ripeness analysis in this case now is entirely different, there is no reason for this Court to review the ripeness analysis undertaken by the Courts below and the petition should be denied for this reason. *See Ticor Title Insurance Co. v. Brown*, ___ US ___, 114 S Ct 1359, 1362 (1994) (writ dismissed where, *inter alia*, not clear that resolution of issue would make any difference even to parties).

*B. In Any Event, There Was No Prior Restraint Here*

Even if the Act had never been enacted, the petition still would be of no merit. There was no prior restraint of speech here. A prior restraint is an order "'*forbidding* certain communications when issued in advance of the time that such communications are to occur.'" *Alexander v. United States*, 113 S Ct 2766, 2771 (1993) (quoting M. Nimmer, Nimmer on Freedom of Speech section 4.08 at 4-14 [1984]). Here, without a franchise, Liberty could have sent its cable television signal to the exact same people, in the exact same place, at the exact same time; the only difference was that for Liberty to avoid the franchise requirement the signal had to travel between buildings, on the way to Liberty's subscribers, by microwave rather than wire. Liberty utterly failed to prove

that it could not send a microwave signal to any willing listener. To the contrary, it said on at least two occasions that if non-common systems were subject to the franchise requirement it would simply use microwave exclusively (*supra* pages 7, 9).

This makes plain that the franchise requirement, in this context, was a time, place and manner restriction, specifically a manner restriction, and not a prior restraint. *See generally Ward v. Rock Against Racism*, 491 US 781, 791 (1989); *Gannett Satellite Information Network v. Metropolitan Transportation Authority*, 745 F2d 767, 772-74 (2d Cir, 1984). In fact, although Liberty never argued that if the franchise requirement were a time, place or manner restriction, it is an invalid time, place or manner restriction, we note that the fact that the speech can take place elsewhere is a factor weighing in favor of the validity of a time, place or manner restriction. *E.g., Gannett Satellite Information Network v. Metropolitan Transportation Authority*, *supra*, 745 F2d at 774.

Liberty recognizes that the two cases it puts forward as most similar to the present case are in fact so dissimilar that they must be hidden in a footnote (Petition at 13 n.14). In *Organization for a Better Austin v. Keefe*, 402 US 415, 417 (1971), a court order enjoined the petitioners "'from passing out pamphlets, leaflets or literature of any kind, and from picketing, anywhere'" in the city. In *Vance v. Universal Amusement Co.*, 445 US 308, 311 (1980), state statutes authorized state judges, on the basis of a showing that obscene films had been exhibited in the past, to prohibit future exhibitions of films not yet found obscene. The restraints in those cases were total and were completely unlike the alleged "restraint" here.

Furthermore, it is plain that Liberty's first amendment claim is no more and no less than that it would have cost it more money to "speak" by microwave than by cable (*see supra* page 7, 11-13; Petition at 9 n.11). This was the only alleged "burden" on Liberty's right to "speak." However, the first amendment protects the right to speak, not the right to speak profitably or at the lowest possible cost. *Amsat Cable v. Cablevision of Connecticut*, 6 F3d 867, 871 (2d Cir, 1993); *Gannett Satellite Information Network v. Metropolitan Transportation Authority*, *supra*, 745 F2d at 774.

Liberty argued below, but does not press in its petition, that it allegedly was between a rock and a hard place because the standstill order prohibited it from creating new non-common systems without a franchise but the City allegedly had no procedure in place for Liberty to obtain a franchise. The Court of Appeals correctly held that in the complex area of cable television regulation, the first amendment and the due process clause do not require that franchising authorities have a franchise application on the shelf waiting for every conceivable type of applicant (*supra* page 17).

### C. *Liberty Does Not Challenge The Abbott Laboratories Test*

Liberty does not ask this Court to modify the *Abbott Laboratories* test but merely quarrels with the result reached by the Court of Appeals on the facts of this case. Liberty takes the extreme position that every "enforced" administrative order is ripe for review under *Abbott Laboratories* (Petition at 20). If adopted by this Court, this view would effectively render *Abbott Laboratories* irrelevant and create chaos for every government agency that proceeds against a party that can concoct some theory under which its constitutional rights are being violated. Such parties instead can raise their

constitutional claims in the administrative proceedings and on judicial review of the final administrative action (*see supra* pages 10-11). *Cf. Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 US 619, 629 (1986) (under doctrine of *Younger v. Harris*, 401 US 37 [1971], "it is sufficient ... that constitutional claims may be raised in state-court judicial review of the administrative proceedings"); *Cecos International, Inc. v. Jorling*, 895 F2d 66, 70-71 (2d Cir, 1990) (in *Younger* context New York provisions for judicial review of administrative determinations provide adequate opportunity to litigate constitutional issues because as-applied constitutional claims may be raised in proceedings under Article 78 of Civil Practice Law and Rules and facial

constitutional challenges may be asserted by conversion of Article 78 proceeding into declaratory judgment action).

## CONCLUSION

**THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.**

Respectfully submitted,

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